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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1407

RICHARD V. HENNINGER, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

The Respondent's memorandum in opposition makes several contentions:

1. "The fact that Petitioner's injury was sustained shortly before and in contemplation of discharge is immaterial" (Resp. 2).

No argument is presented. Respondent, in his footnote 2, points out that in *Brooks v. United States,* 337 U.S. 49, *United States v. Brown,* 348 U.S. 110 and *Downs v. United States,* 249 F.Supp. 626, the Court granted relief because the Plaintiff in each case was on leave or pass. Respondent concludes that Mr. Hen-

ninger, being on active duty, does not fall within the exception to the rule.

Downs was not on an ordinary pass as Respondent contends. He was on a special pass for the specific purpose of having his household goods picked up and shipped in accordance with military orders. *Downs v. United States,* 249 F.Supp. 626, at 628.

An individual on leave or pass is subject to being recalled at a moment's notice on the oral command of his immediate superior. He is subject to military discipline and to military rules and regulations.

Mr. Henninger's status at the time of the surgery was even further removed from active duty status. He had been relieved of all military duties, except processing for discharge. He could not be ordered to perform any regular duty assignment that would prevent his being discharged four days later (except by order of the President).

Mr. Henninger's status at the time of the negligent treatment following the surgery was even further removed from active duty. He was on *active duty for the purpose of medical care and treatment only* (Pet. 22-23).

2. Respondent notes that Mr. Henninger is receiving compensation (Resp. 3).

There is no argument on this point. However, Respondent fails to argue Petitioner's contention that the compensation theory is not a valid rationale for excluding servicemen (Pet. 12-17).

In his final paragraph, Respondent rejects the estoppel theory (Resp. 3).

Footnote 2 of Respondent's memorandum implies that there are no decisions in conflict with *Feres*.

In *Hale v. United States,* 416 F.2d 355 (6th Cir., 1969), the Court reversed a lower court order dismissing the complaint and remanded the case for hearing on the question, "Did Hale's injuries arise out of or in the course of military duty"?

The Court notes the great confusion among the circuits as to the proper standard to apply. At page 359 of the opinion, the Court lists a number of cases under each of three headings: (1) Courts using the line of duty standard; (2) Courts using the incident to service standard; and (3) Courts employing both standards. Also on page 359 the Court states:

> "We believe that the Supreme Court has never to date had before it a case which required it to make a clear cut choice between the conflicting standard referred to above as set out in *Brooks* and *Feres* and *Brown.*"

CONCLUSION

Respondent has not responded to the questions before Court. This writer can only conclude that he has not done so because his position is logically absurd.

Dated, San Francisco, California,
August 30, 1973.

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